Petition

81-832

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No.

in the Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation now known as WOODLANDS PARK BAPTIST CHURCH; WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Petitioners

vs.

CITY OF BOCA RATON, FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the Fourth District Court of Appeals
of the State of Florida

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QUESTIONS PRESENTED

Whether the Woodlands Christian Academy is an integral and inseparable teaching ministry of the Faith Baptist Church now known as Woodlands Park Baptist Church such that requiring that ministry to obtain a separate conditional use permit in addition to that already held by the Church, violates Petitioner's First Amendment right to Free Exercise of Religion under the United States Constitution.

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NO.

In the Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation now known as WOODLANDS PARK BAPTIST CHURCH; WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Petitioners

vs.

CITY OF BOCA RATON, FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI to the Fourth District Court of Appeals of the State of Florida

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation now known as

WOODLANDS PARK BAPTIST CHURCH; WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Fourth District Court of Appeals, Florida, entered in the above-entitled case on May 20, 1981.

OPINIONS BELOW

The opinion of the Florida Supreme Court is unreported but is printed in Appendix A hereto, *infra*, page 1. The judgment of the Fourth District Court of Appeals, Florida is printed in Appendix A hereto, *infra*, page 2. The Journal Entry of the Judgment of the Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County, Florida, is printed in Appendix A hereto, *infra*, pages 5-10.

JURISDICTION

The judgment of the Fourth District Court of Appeals, Florida (Appendix A, *infra*, page 2) was entered on May 20, 1981. A timely petition for rehearing was denied on July 1, 1981. (Appendix A, *infra*, page 33). Thereafter on August 5, 1981, the Florida Supreme Court denied a writ of certiorari (Appendix A, *infra*, page 1). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution, the Florida Constitution, and the City of Boca Raton Code of Ordinances are involved in questions presented:

UNITED STATES CONSTITUTION

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLORIDA CONSTITUTION

Article I §3

> "There shall be no law respecting the establishment of religion or prohibit or penalizing

the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety . . ."

CITY OF BOCA RATON
CODE OF ORDINANCES

Section 25-66.10

(B) Enumeration of conditional uses.

(1) Churches and places of worship of God, including church operated day care centers and social service activities.

. . .

. . .

(4) Public, private and parochial schools having an established and officially approved curriculum, including day care, pre-school, kindergarten, elementary, middle and high schools, colleges or universities. . . .

STATEMENT OF CASE

This is an action for injunctive relief brought by the City of Boca Raton in the State of Florida against the Woodlands Park Baptist Church (formerly the Faith Baptist Church of Boca Raton) and Pastor Jerry Peterson, seeking to enjoin the Church's day school ministry.

The complaint filed by the city alleged that Woodlands Christian School is operating in violation of the following ordinance: Boca Raton Zoning Code §25-66.10(B)(1) and (4).

The Petitioners established as fact at all levels below that Woodlands Christian Academy is an integral and inseparable ministry of Woodlands Park Baptist Church and is, therefore, exempt from complying with the City of Boca Raton zoning ordinance because of its right to Free Exercise of Religion as guaranteed by the First Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment.

The Petitioners, Woodlands Park Baptist Church (hereinafter sometimes referred to as the Church) is a Florida corporation lawfully established under the zoning ordinances of the City of Boca Raton in a residential district. The Church is an independent, fundamental, Bible-believing and teaching church whose membership is composed of believers who hold a firm conviction that the Bible is the inspired Word of God and that it must serve as the source of guidance for all aspects of life.

Pastor Jerry Peterson has been the Pastor for the Church since its beginning in 1974. The operation of the Church and all of its ministries is centered on the Biblical concept that Hell is reserved for the sinner, but Heaven is open to all who put their personal trust in Jesus Christ and believe in His death and resurrection as the payment for all sin. Pastor Peterson defined this as being a fundamental or born again Christian. In observance of this fact, and the commands of the Bible,

the Church operates all of its ministries for the ultimate purpose of spreading the manner in which salvation is obtained. Therefore, the tenets of the faith and beliefs of members of the Church and fundamental Christians generally require that their children receive an education which is Biblical in its framework of philosophy and suppositional standards. Faced with this command, the members of the Church and Pastor Peterson believed that to fulfill this command it was necessary to establish their own teaching ministry where their children could learn in a Christian environment. As a result of this conviction, Woodlands Christian Academy (hereinafter sometimes referred to as the "church-school") began operation on church property as an integral and inseparable part of the ministry of Woodlands Park Baptist Church. Woodlands Christian Academy has operated at the present site during the 1978-79 and 1979-80 school years. Woodlands Christian Academy was established therefore, to teach young people a way of life in accord with the Christian convictions of its membership.

The Woodlands Christian Academy uses a curriculum which utilizes the Holy Bible as the main text. This curriculum has been developed by Accelerated Christian Education, Inc., (hereinafter referred to as ACE). This teaching ministry is unique in that each child works at his own rate of speed in each of the various subject areas; math, social studies, science and English, with each subject organized into numerous packets of materials which increase in difficulty as the child progresses. These packets are formally called "PACES." Each subject area per grade contains twelve (12) PACES. Thus, a child having graduated from grade twelve (12) in a school using the ACE system will have completed

approximately one hundred and forty-four (144) PACES in each subject taken, although there is no set number of years which it takes to graduate as long as the student accomplishes that amount of work.

The ACE method of instruction differs from other educational methods in that all subjects are presented to the students from a Biblical viewpoint, so that in each subject taken by the student he is constantly learning to embody within himself the Christian way of life. Thus, the PACES used are replete with verses taken directly from the Bible. A child working on a reading PACE, therefore, will learn to read by examining Bible verses which at the same time will reflect the ideal Christian character trait which the child is encouraged to emulate. A child learning under this teaching ministry therefore, is continuously being exposed to the Word of God no matter what may be the subject he studies. As such, all subjects taught as part of the Woodlands Christian Academy ministry of Woodlands Park Baptist Church are fully religious, rather than secular, in nature.

In the trial court below, the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Petitioners submitted trial and post trial briefs as well as presented oral argument urging the court to apply the three-tiered test enunciated by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (Appendix pages 5-10). Petitioners argued that forcing the Church to seek a conditional use permit for one of its ministries even though the Church had already obtained the proper zoning permit, violated its right to free exercise of religion.

Petitioners also submitted a brief and argued in the Florida Court of Appeals that the Circuit Court erred in not applying the tests of "compelling state interest" and "less drastic means". Had the Florida courts properly applied those tests, it would have found that the City of Boca Raton failed to articulate a compelling state interest that justified the demonstrated infringement of Petitioners' free exercise rights.

REASONS FOR GRANTING WRIT

Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Lower Courts

It is the position of Petitioners in this case that Woodlands Park Baptist Church, once being lawfully established under the Palm Beach County zoning ordinances as a church, does not need additional approvals to operate any of its religious ministries including but not limited to its teaching ministry, the Woodlands Christian Academy, and that the application of said zoning laws' conditional approval provisions to this church ministry would clearly and directly violate Petitioner's right to the Free Exercise of religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Florida Constitution.

The day school is an integral and inseparable ministry of the Woodlands Park Baptist Church just as the Sunday School, youth groups and all other ministries of the Church are inseparable from the Church and, therefore, should be treated in all respects just as the Church is treated. The Woodlands Christian Academy is inextricably intertwined with the Church in that:

1. Pastor Jerry Peterson has direct control over the Woodlands Christian Academy just as he has over all of the Church's ministries;

2. The teaching ministry does not have its own charter separate and apart from that of the Church; it also has no separate employees since all employees are

employed by the Church and must abide by all of the same personnel standards which must be met by other members of the Church staff; and

3. The sole purpose of the teaching ministry of the Church is to propagate the faith and provide Christian instruction in a Christian environment.

The Fourth District Court of Appeals of the State of Florida, in not considering the church-school to be an integral and inseparable ministry of the Church, has ruled contrary to the view adopted by this Court and the highest courts of many states. The Florida Appeals Court refuses to acknowledge that the term "church" is not limited to Sunday morning worship services, but includes many different uses which are necessary, accessory and/or incidental to a Christian church. The Court based its opinion on the Code of Ordinances which does not define "church," but leaves that definition to the State of Florida Courts. Other states have recognized, however, that there are extremely grave and damaging constitutional implications in allowing an administrative or judicial body to determine what is or is not reasonably a part of a church or part of the religious practice of a particular faith.

The Court, by its interpretation and application of the Code of Ordinances, is attempting to define religious activity. The Court's position rests on the bare assumption without justification, that the activities carried on in the church-school can be distinguished from the basic purposes of a church and that it has the power to define and delimit where some church activities begin and others end. If the First Amendment means anything, it means freedom from governmental definitions of

religion. *Sherbert v. Verner*, 374 U.S. 398 (1963) *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the instant case, the Florida Court of Appeals has established itself as the interpreter of church activities. A significant line of cases decided by this Court beginning with *Watson v. Jones*, 80 U.S. 697 (1871) and continuing with *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Presbyterian Church v. Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); and *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), has held that the First Amendment places an affirmative duty upon the government to respect the internal autonomy of religious institutions. Under the Free Exercise Clause of the First Amendment, the courts do not have the authority to define, limit or restrict what a religious organization claims are its religious activities. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943).

Under the First and Fourteenth Amendments to the United States Constitution, the descriptive term "church" must be given the most inclusive and all embracing definition. Therefore, the concept of what constitutes a church has changed from a place of worship, used once or twice a week, to a church used during the entire week, nights as well as days, for various parochial and community functions. *Unitarian Universalist Church v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (1970).

The law of multiple jurisdictions is clear and unambiguous that for purposes of legal consideration, a school may be considered as an integral and inseparable ministry of a church. *In Matter of Community Synagogue*

v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956), the Appeals Court for the State of New York, in applying the meaning of church use as used in a village ordinance, to a synagogue which was established for religious worship along with religious teaching and training, reasoned that:

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation . . . ." 1 N.Y.2d 508, 136 N.E.2d 827 (1956).

In *City of Concord v. New Testament Baptist Church*, 118 N.H. 56, 382 A.2d 377 (1977), the New Hampshire Supreme Court ruled that a special permit was not needed to operate a day school ministry of the New Testament Baptist Church. The school was instituted in order to instill Christian values in the children of the church members and was located one block from the church. The parents refused to send their children to public school where humanistic values were taught. According to the Court, the school "was a permitted use under the ordinance allowing facilities usually connected with a church." Moreover, the Court held that a "school may be considered as an integral and inseparable part of a church." 118 N.H. 56 at 60.

Under the above-mentioned case law, Woodlands Christian Academy must be considered inseparable from the Woodlands Park Baptist Church. As in *Concord, supra*, the true purpose of the church-school is to impart to the children fundamental Christian values rather than secular or humanistic values. The curriculum used at the Woodlands Christian Academy is called "ACE;" Accelerated Christian Education. This is a plan of Christian education which incorporates the Word of God into all subjects of study, whether that be science, English, arithmetic, etc. Through this method of teaching, the children acquire Christian morals, and a reverence for the Lord rather than a reverence for man. The education received by the children at the Woodlands Christian Academy is, therefore, inherently religious and cannot be distinguished from what is done by the Church on Sunday mornings. The refusal of the Court of Appeals Court to recognize the inseparability of the Woodlands Park Baptist Church and the Woodlands Christian Academy is clearly in contradiction of case law established in many states.

Moreover, every Christian school case that has been ruled on by this Court has found that Christian education serves an integral function in the mission of a church and is, therefore, a religious activity protected by the First Amendment. For example, in *Lemon v. Kurtzman*, 403 U.S. 602, 609 (1970) this Court stated:

> Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it is also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

Justice Douglas in his concurring opinion stated it as follows:

> The analysis of the constitutional objections to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith. *Id.* at 628.

And in *Meek v. Pittinger*, 421 U.S. 349, 366 (1975) the Court stated that:

> The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.

Because of the religious influence in the teaching of secular subjects, this Court found that it could not approve funding even of secular instruction in private Christian schools. The conclusion must therefore be drawn, that if the education of students by these private Christian schools is so religious as to violate the Establishment Clause if public funds are used, then this religious nature of the schools is also entitled to the protection guaranteed religions by the Free Exercise Clause.

Moreover, the Florida Circuit Court did not apply the three-tiered test necessary for determining violations of Free Exercise of Religion as established by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and

Wisconsin v. Yoder, 406 U.S. 205 (1972). Under that test, Petitioners must show that their religious convictions are truly held, and that applying for an additional conditional use permit produces an undue burden. The burden then shifts to the city to show a compelling interest which would allow them to violate Petitioners' free exercise of religion.

Petitioners have proved without contention, the first two tiers of the *Sherbert, Yoder* test. It was established and uncontroverted at trial that Pastor Jerry Peterson's beliefs are truly and sincerely held and are the products of his firmly rooted fundamental belief in the Bible as being the inspired and inerrant Word of God. These beliefs are also firmly subscribed to by the members of the Church. As previously stated, Petitioners believe that their church-school is an integral and inseparable ministry of their Church, and is treated as such in all respects. Petitioners' truly and sincerely held religious beliefs prevent them from seeking approval and regulation of their Church's ministerial functions. Section 26-66.10 B(4) of the Boca Raton Code of Ordinances restricts the granting of a conditional use permit to only those schools which have an officially approved curriculum. Therefore, to seek the City's approval would produce an undue burden upon the free exercise of the Church's religion.

The Florida Circuit Court however, failed to apply the third aspect of the test and did not require the city to show a compelling interest. The Court instead ruled that Petitioners must first seek the City's approval before they can test the degree of the City's compelling interest. Since the very act of applying for the City's approval of the Church's ministry unduly burdens the

Church's free exercise of religion, it is incumbent upon the City to initially prove that it has a compelling interest before the Church can be compelled to make application, thereby effectively preserving the Church's rights guaranteed them under the First Amendment.

The act of applying for the conditional use permit necessarily means that the City of Boca Raton has the ability to officially approve or condemn the curriculum being used at the church-school. Code of Ordinances §25-66.10 B(4). This blatantly interferes with Petitioner's First Amendment right to practice their religion in the way dictated by their faith. The City Ordinance invests City officials with the unbridled discretion to disapprove of Petitioner's curriculum and thereby disallow Petitioners' right to teach their children as the Bible commands. The rulings below emphatically take the position that the City of Boca Raton has the power to regulate Petitioners' church and religious practices regardless of its interference with Petitioners' religious beliefs. This result is clearly contrary to this Court's decisions in *Wisconsin v. Yoder*, *Sherbert v. Verner*, and *Cantwell v. Connecticut*, 310 U.S. 296 (1939).

The city must show that its interest in defining and approving of church ministries overrides Petitioner's First Amendment rights and that the City's interests cannot be served by any alternative means having a less drastic impact. In *Yoder*, this Court stated:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion.

The City's failure to demonstrate this compelling state interest, and the Florida Courts' failure to consider any compelling state interest, severely violates the Church's First Amendment Free Exercise rights.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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Hollywood, Florida 33020
(305) 923-6500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on October _____, 1981, pursuant to Supreme Court Rule 33, three copies of the foregoing Petition for Writ of Certiorari were mailed to M.A. GALBRAITH, JR., City Attorney, Attorney for Respondent, 201 W. Palmetto Park Road, Boca Raton, Florida 33432.

_____

JON JAY FERDINAND

Appendix

[RECEIVED OCT 16 1980]

SUPREME COURT OF FLORIDA

WEDNESDAY AUGUST 5, 1981

CASE NO. 60,988

District Court of Appeal,
4th District – No. 81-263

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation, WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Petitioners,

v.

CITY OF BOCA RATON,
a Florida municipal corporation,

Respondent.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court
by: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Clyde Heath, Clerk
Hon. Thomas E. Sholts, Judge
Hon. John B. Dunkle, Clerk
Jon Jay Ferdinand, Esquire
M. A. Galbraith, Jr., Esquire

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1981

Case No. 81-263.

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation, WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Appellants,

v.

CITY OF BOCA RATON, a Florida municipal corporation,

Appellee.

Decision filed May 20,1981

Appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge.

Jon Jay Ferdinand of Law Offices of
Paul L. Backman, Hollywood, for appellants.

M. A. Galbraith, Jr., City Attorney,
City of Boca Raton.

PER CURIAM.

Affirmed.

LETTS, C.J., MOORE and BERANEK, JJ., concur.

[RECEIVED JUL 23, 1981]

A TRUE COPY

MANDATE

from

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Gavin K. Letts, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and the seal of the said Court at West Palm Beach, Florida on this day.

Date. July 22, 1981
Case No. 81-263
County of Origin Palm Beach
T.C. Case #78-4747 CA
Style: Faith Baptist Church etc. v. City of Boca Raton

[Illegible] L. Heath
Clerk of the District Court
of Appeal of the State of Florida,
Fourth District.

cc; Hon. John B. Dunkle (Orig.)
Jon Jay Ferdinand, Esq.
M. A. Galbraith, Jr., Esq.

[RECEIVED FEB 28 1980]

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR WEST PALM PALM BEACH COUNTY, FLORIDA

CASE NO. 78-4747 CA (L) 01 G

CITY OF BOCA RATON, a Florida municipal corporation,

Plaintiff,

vs.

FAITH BAPTIST CHURCH OF BOCA RATON, INC., et al.,

Defendants.

FINAL JUDGMENT

This action was tried without jury on October 2, 1979. The Plaintiff is the City of Boca Raton (CITY), and the Defendants are Faith Baptist Church of Boca Raton, Inc. (FAITH BAPTIST), Woodlands Christian Academy (WOODLANDS), and Pastor Jerry Peterson (PETERSON). The Defendants shall be collectively referred to as the "CHURCH."

The controversy involves the failure of the CHURCH to obtain a conditional use approval from the CITY for the WOODLANDS' school use on a parcel of property located within the CITY on St. Andrews Boulevard. The parcel is more particularly described in paragraph 3(B) of the Amended Pretrial Stipulation and shall hereinafter be referred to as the "ST. ANDREWS SITE."

The parties submitted extensive post-trial briefs on the issues. The Court would like to compliment both counsels on the quality of their briefs.

The Courts adopts as findings of facts those facts stipulated in the Amended Pretrial Stipulation. Based upon the testimony adduced at the trial and the documentary evidence submitted, introduced and admitted into evidence, the Court makes the following additional findings of facts:

1. The CITY regulates the use of land within its jurisdiction by the common combination of zoning district regulations and a comprehensive plan. The CITY is planned as and has developed primarily as a residential community, with some 70% of all the land within the CITY zoned residential and, more specifically, 60% to 65% of all the land within the CITY zoned for single-family detached housing. The goal of the CITY'S comprehensive plan, adopted pursuant to the Local Government Comprehensive Planning Act of 1975, is to maintain the residential qualities of the CITY.

2. The R-1-D zoning district is one of nine single-family residential zoning districts within the CITY. The only permitted use in the single-family residential districts are single-family residences and certain accessory uses, such as garages, carports, swimming pools and tennis courts. Other uses which are usually found in single-family districts, such as churches, cemeteries, civic buildings and schools are permitted only through a conditional use approval. The conditional use approval procedure requires an application accompanied by a detailed site plan, review and recommendation by the

CITY staff and the Planning and Zoning Board, and, finally, consideration by the City Council.

3. The enumerated conditional uses in Section 25-66.10(B), Code of Ordinances, are generally appropriate uses for residential districts, but a special review is necessary to insure that the use requested does not adversely impact upon the residential character of the neighborhood and that any possible adverse impact may be reduced by appropriate conditions. The typical potential, adverse impacts are:

A. Physical impact of the structure on the immediate area.

B. Spatial relationship of the structure to the surrounding residential uses.

C. Aesthetic factors.

D. Generation of traffic.

E. Generation of noise.

F. Provision of municipal services, including water, sewer, police and fire.

G. Hours of activity.

4. As a result of the three applications for conditional approval that were submitted for the ST. ANDREWS SITE and the two approvals that were granted (CA-75-5 and CA-78-7), as of the date of the last approval and continuing since then to the date of trial,

the approved conditional uses for the ST ANDREWS SITE were a church, a day care center and a Sunday school.

5. In November, 1978, and subsequently to the time of trial, the ST. ANDREWS SITE was being occupied and utilized by WOODLANDS as a school.

Based upon the findings of facts stipulated to by the parties and found by the Court, the Court makes the following conclusions of law:

1. WOODLANDS' use of the ST. ANDREWS SITE requires a conditional approval from the CITY, pursuant to Section 25-66.10(B) (4), Code of Ordinances. The prior approvals granted do not approve or authorize the WOODLANDS' school use.

2. The religious orientation of the WOODLANDS' use does not exempt that use from the requirement to obtain a conditional use approval from the City. *Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955); *Pylant v. Orange County*, 328 So.2d 199 (Fla. 1976), *Town v. State of Florida ex rel. Janet Reno*, 377 So.2d 648 (Fla. 1979).

3. The CHURCH should and ought to apply to the CITY for a conditional use approval for the WOODLANDS' use so that the local administrative process may hear and consider all the relevant factors, including the competing police power and religious interests. *Jewish Reconstructionist Synogogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283, 379 N.Y.S.2d 747, 342 N.E.2d 534 (1975);

Hillsboro Association etc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976).

Now therefore, it is hereby

ORDERED AND ADJUDGED:

1. The Defendants, FAITH BAPTIST, WOODLANDS and PETERSON, and any boards, officers or other agents or representatives of them, or any persons acting in concert with them, are hereby enjoined and restrained from operating that certain school known as Woodlands Christian Academy, or any other such or similar school, on the ST. ANDREWS SITE until further order of this Court.

2. The injunction set forth in paragraph 1 above shall not take effect for 30 days from the date of this order, and if during said 30-day period any of the Defendants apply to the CITY for a conditional use approval for the WOODLANDS' use, said injunction shall stand stayed until final action by the CITY on that request for conditional approval.

3. Within 10 days of final action by the City Council of the CITY on the request for conditional use approval described in paragraph 2 above, the CITY shall inform the Court of the final action, and either party may apply to the Court for further relief. Such further relief may be to enforce the terms of the approval or for relief from the terms of the approval.

4. The Court shall retain jurisdiction of the parties and the subject matter for the purpose of providing such additional relief as may be necessary.

DONE AND ORDERED this 25th day of February, 1980, at West Palm Beach, Florida.

/s/ T E Sholts
THOMAS E. SHOLTS
Circuit Judge

Copies furnished:

M. A. Galbraith, Jr., Esq.
Jon J. Ferdinand, Esq.
Robert A. Eisen, Esq.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 81-263

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation, WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Appellants,

vs.

CITY OF BOCA RATON,
a Florida municipal corporation,

Appellee.

APPELLANT'S MOTION FOR REHEARING AND/OR CLARIFICATION

Defendant/Appellant, FAITH BAPTIST CHURCH OF BOCA RATON, et al, moves this Court for rehearing and/or clarification pursuant to Florida Rules of Appellate Procedure 9.330 of its per curiam affirmed decision filed in this matter on May 20, 1981, and as grounds therefore states:

1. Appellant, FAITH BAPTIST CHURCH, et al, filed a Notice of Appeal on March 25, 1980, with the Florida Supreme Court, appealing a final judgment granting a permanent injunction to Plaintiff/Appellee, CITY OF BOCA RATON entered against the Appellant in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida on February 25, 1980. Oral argument on said appeal was held before the Fourth District on May 13, 1981. The Fourth District

filed its per curiam, affirmed decision on said appeal on May 20, 1981.

2. That the Appellant believes this Court overlooked or misapprehended the following points of law or fact:

A. That the Appellants, FAITH BAPTIST CHURCH et al originally sought zoning approval to obtain the right to build and operate a church which was approved and that the record proved that the subsequent operation of a Day School was and is an integral part of and ministry of said church and thus said religious orientation of the school use exempts said use from the zoning conditional approval process and therefore, this Court overlooked the cases cited by Appellant in its brief, *City of Concord v. New Testament Baptist Church* 382 A.2d, 377 (1977) and *The County of Yolo vs. Christian Life Center of West Sacramento*, Superior Court of the State of California, County of Yolo, Case No. 40751: *Unitarian Universalist Church v. Shirten*, 314 N.Y.S.2d 66, 63 Misc.2d 979 Supreme Court, Nassua, P.C. (1970).

B. That even though the Appellant originally secured zoning approval and went through the conditional approval process, such does not preclude attacking said restrictions or approval process under the subject ordinance at the trial level in this cause as Appellant did, because the ordinance itself in establishing different categories for Churches and parochial schools, especially where said ordinances 25-66.10(B)(4), dealing with parochial schools requires for conditional approval of

Appellant's school, that it must have an established and officially approved curriculum. The failure of this Court to hold that said school use is exempt from the conditional approval process, where the record shows that said use is an integral and inseparable ministry of Appellant Church, is contrary to Federal Law and Florida Law in that:

(1) The injunction enforcing said ordinance and its conditional approval process violated the Free Exercise Clause of the First Ammendment in that it prohibits the religious use of the school ministry, since the U.S. Supreme Court has repeatedly held that government regulation of activities central to an individuals' sincere religious beliefs violates the Free exercise, even if government is motivated only by secular concerns, unless government officials show a compelling justification for their regulatory efforts and it is the least restrictive means of achieving said compelling state interest.

See: *Wisconsin v. Yoder*, 406 V.S. 205 (1972)

Sherbert v. Verner, 374 V.S. 398 (1963) and the most recent U.S. Supreme Court case of *Thomas v. Review Board* of the *Indiana Employment Security Division et al*, U.S. Law Week, vol. 49, No. 39, 4341, decided April 6, 1981 wherein the Court stated:

(a) at page 4344, "Where the state conditions receipts of an important benefit upon conduct prescribed by a religious faith or where it denies such a benefit because of conduct mandated by

religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists [and] even though compulsion may be indirect, the infringement upon Free exercise is nonetheless substantial.

(i) By analogy, under the ordinance Appellant in order to operate a school on the Church site would be required to modify its religious beliefs on educating its students from religious concepts and curriculum, as set forth in the records, to those to be officially approved and established by the City or State. Thus, by complying with the ordinance, Appellant's Free exercise rights would be infringed upon.

(ii) Also such approval process requiring an established and officially approved curriculum necessarily would further violate the establishment clause of the First Ammendment because determining what is and what is not officially approved and established curriculum would excessively entangle the City officials or State in religious questions *Lemon v Kurtzman*, 403, U.S. 607 (1971) and *State v. Whisner*, 47 Ohio State 2d 181, 351 n.e. 2d 750 (1976). The United States Supreme Court held that the Establishment Clause prohibit "excessive and enduring entaglements between State and Church by way of State inspections and evaluations of the religious content of a religious organizations" in *Lemon v. Kurtzman*, 403 U.S. at 619, and by this Courts affirmance of trial Court decision, the City of Boca Raton is freely given authority to violate

said prohibition by just denying or conditioning approval of the school ministry on whether or not they find that curriculum is established and officially approved.

(b) on page 4344, "The State may justify an inroad on religious liberty by showing it is the least restrictive means of achieving some compelling state interest: "However, . . . only those interests of the highest order can overbalance legitimate claims to the Free exercise of religion:" citing *Wisconsin v. Yoder*, at 215.

(2) This Court in affirming the lower Court decision opens the door to cities to enforce its laws against legitimate religious practices without requiring said city to meet the standards of *Sherbert v. Verner*, Supra, since the CITY OF BOCA RATON did not establish a compelling justification at trial, which was its burden of proof, by records evidence that the regulation of the religious activity to wit: school use was an important and legitimate government interest in that those interests are in fact affected by activity.

(a) Record clearly shows the opposite since no proof of violation of public interests of health, safety, peace, order, morality, and welfare with the use that has been in existance for nearly three (3) years.

(b) This record distinguishes this case from all the zoning cases cited by Appellee where there was record proof of such violations of State interest.

(c) Such record proof is required since unless the religious practices themselves threaten the compelling state interest, the activity should be exempted. See e.g. *Wisconsin v. Yoder*, supra, 406 U.S. at 224,225,227,229,230, *Sherbert v. Verner*, supra, 374 U.S. at 407; *Beaunfield v. Brown*, 366 U.S. 599, 607-09 (1969); *Prince v. Massachusettes*, 321 U.S. 158, 167,170, (1974).

C. This Court further has overlooked the rationality of the Florida Supreme Court decision in *Town v. State of Florida*, ex rel, *Janet Reno, et al*, 37750 2d 648 (Fla. 1979) where the Supreme Court decided that in order for an injunction to be granted prohibiting a religious activity, there must be evidence and record proof that a compelling state interest was shown by the City to justify State intervention and infringement upon said practices and in so finding the Florida Supreme Court looked to the *Sherbert v. Verner* tests; in affirming the lower Court injunction. Although the Appellee may argue that said Supreme Court also denied use of the property as a Church, such facts of that case are distinguishable from the instant case in that:

(1) *ZION Coptics* never applied for zoning approval for their church, wherein the Appellants herein did apply and the first approval was without conditions or prohibitations to school use.

(2) *ZION Coptics* not contest zoning ordiance as it applied to their use of canabis, wherein the Appellants herein did attack ordinances

at trial level as to its restrictions on school use.

D. This Courts affirmance of the lower Court decision also is contrary to and overlooks prior decisions of the Florida Courts which require in granting an injunction that the Plaintiff seeking such relief in this case, the Appellee must show that either a nuisance exists or that such use created an irreparable injury. This is similar to the requirement under *Sherbert u. Verner*, supra, that the City or State must demonstrate no alternative forms of regulation which would further whatever interest they sought to preserve and without such proof in this case by the Appellee, the injunctions should have been denied as a means of enforcing the interest stated, but not proved, in the record, to wit: preserving the livability of the residential community. See: *Godwin u. Phifer*, S. Fla. 441, 41 5.594, (Fla 1900) *Williams u. Dormony*, 99 Fla, 496, 128 50. 117 (Fla. Sup. Ct.) and even *Town u. State of Florida ex rel Janet Reno* supra. where Trial Court found City proved that a public nuisance existed of illegal keeping, use and delivery of canabis and that enforcement by any other means was ineffective See: paragraphs 2,4, & 11 of Trial Court order in that case. (said order is attached as Exhibit "A" to this Motion for Rehearing.) This Court in affirming established that the Appellee, CITY OF BOCA RATON, does not have to prove as the Plaintiff in Janet Reno case, supra, was required that it could only preserve the interest that it alledged it needs to protect by enforcement of conditional approval process by injunction the use as opposed to using

other less restrictive means such as building codes, sanitation codes, fire codes, or police enforcement of traffic laws and thus this Court should have reversed the Trial Court decision granting injunction relief which would require the Appellant to either violate its religious convictions by submitting its educational ministry to the requirements of the Zoning Conditional approval process or close down such school and thus prevents said Appellant from freely exercising its First Amendment rights.

3. It is respectfully requested that in the event this Court denies Appellant's Motion for Rehearing, that an opinion be written which:

A. Establishes that this Court expressly finds in construing the First Amendment of the United States Constitution and Article I, Section 3 of the Florida Constitution that the Religious orientation of the WOODLAND'S School use does not exempt that use from the requirement to obtain a conditional use approval from the City, where such City's ordinance requires in order to grant approval of a parochial school that the school have an established and officially approved curriculum.

F. Or, in the alternative, if this Appellate Court based its decision on the fact that proof by the Appellee only of a violation of Zoning ordinance is enough to enforce said ordinance by injunction without requiring record proof by the Appellee of the proof required under *Sherbert u Verner,* supra and its progeny, that this Court so state in a written opinion.

4. That if the Court is not inclined to grant a rehearing the Appellant further respectfully requests this Court to write a written opinion in accord with the above points so that it is clear that it has expressly construed the First Amendment of the U.S. Constitution or Article I, Section 3 of the Florida Constitution, in denying the appeal, so that the Appellant can attempt to invoke the Discretionary Jurisdiction of the Florida Supreme Court under Rule 9.030(a)(2)(A)(ii), or in the alternative, if this Appellate Court based it decision for reasons that the Appellee did not have to meet the *Sherbert u. Verner*, supra, compelling interests tests, to get an injunction to enforce its zoning ordinances, that this Court certify that its decision directly conflicts with the decision of the Florida Supreme court in *Town u. State of Florida* ex rel. Janet Reno, supra, so that the Appellant can invoke the Discretion Jurisdiction of the Florida Supreme Court under Rule 9.030(a)(2)(A)(vi).

5. Without a written opinion the implication from the Court's per curiam decision is that legitimate religious practices can be prohibited where such violates a City or State Ordinance irrespective of whether or not there is record proof that the Government Agency seeking, to enforce that ordinance or Law, has proved what is required by the decisions of the United States Supreme Court in the decisions cited both in Appellant's briefs and hereinafter above, and would necessarily under recent developments under Florida Law, see: *Jenkins u State*, 385 50 2d 1356 (Fla. 1980), prohibit the Appellant from raising the issue before the Florida Supreme Court, which distinguishes this case from the Town case, supra, of:

"Whether or not a Church ministry and its religious practices which do not and has not constituted a nuisance, do not and has not violated any criminal laws and which do not and has not violated the health, safety, morality and welfare of a Community & where no proof of any other compelling state interest violation, can be prohibited by the Zoning Conditional Approval Law."

WHEREFORE, Appellant respectfully prays that this Court grant a rehearing and undertakes in the interests of Justice to write an opinion explaining its decision or further certify this cause to be in direct conflict with the Supreme Court Decision in the *Town* case if the per curium decision was based on reasons set forth hereinabove by Appellant in Paragraph four (4) of this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing was mailed to M.A. GALBRAITH, JR., City Attorney, Attorney for Plaintiff, 201 W. Palmetto Park Road, Boca Raton, Florida 33432, this 3rd day of June, 1981.

BY: /s/ Jon Jay Ferdinand
JON JAY FERDINAND, ESQUIRE
Home Federal Tower
1720 Harrison Street
Hollywood, Florida 33020
(305) 923-6500

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

CASE NO. 78-20818
JUDGE BARAD

STATE OF FLORIDA, ex rel JANET RENO AS STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, FLORIDA; and THE CITY OF MIAMI BEACH, a Florida municipal corp.,

Plaintiffs,

vs.

JACQUELYN RENEE TOWN, an individual; and ACCREDITED SURETY & CASUALTY CO., INC., a Florida corporation,

Defendants.

ORDER ON MOTION FOR TEMPORARY INJUNCTION

THIS CASE came on for a hearing on the Plaintiffs' Motion for a Temporary Injunction. The Court held two and one-half (2-½) days of evidentiary hearings and legal argument. Before entering the instant order, this Court reviewed all exhibits and other evidence admitted in supplementation of the oral testimony presented in court. This Court also versed itself in the pertinent law as provided by legal memoranda of counsel.

In light of the above, this Court makes the following findings of fact and conclusions of law.

COUNT I

1. The defendant, JACQUELYN RENEE TOWN, was and is at all times relevant to the instant litigation, the lawful owner of the dwelling house, the address of which is 43 Star Island, Miami Beach, Dade County, Florida.

2. The dwelling house located at 43 Star Island, Miami Beach, Dade County, Florida is visited by persons for the purpose of unlawfully using cannabis (also known as marijuana, also known as ganja), a substance controlled under Chapter 893, Florida Statutes (1978) and is used for the illegal keeping, use and delivery of said cannabis.

EXHIBIT B

3. The defendant, JACQUELYN RENEE TOWN, has direct knowledge of the facts alleged in paragraph number two (2) above and condones that activity.

4. Pursuant to Section 823.10, Florida Statutes (1977), the aforementioned premises is a public nuisance.

5. The defendant, JACQUELYN RENEE TOWN, contends that Section 823.10, Florida Statutes (1977) cannot be constitutionally applied to said dwelling house because of the Free Exercise of Religion Clause of the First Amendment to the Constitution of the United States.

6. Defendant JACQUELYN RENEE TOWN assets that the keeping, use and delivery of cannabis at said premises is directly related to her religious belief and practice as a member of the Ethiopian Zion Coptic Church, a religious faith.

7. The Ethiopian Zion Coptic Church represents a religion within the meaning of the First Amendment to the Constitution of the United States.

8. That conduct referred to in paragraph number two (2) above is related to the religious practice of the Ethiopian Zion Coptic Church, of which defendant TOWN is a member.

9. Regarding the nature of the religious beliefs and practices of the Ethiopian Zion Coptic Church pertinent to the instant litigation, this Court finds the following:

a. Cannabis is not itself an object of worship. Rather, prayer is directed solely to a spiritual "God".

b. Cannabis is smoked as the mystical body and blood of "Jes - us"; serves to permit a member of the faith to go deeper within his consciousness to see everything that he has done wrong; serves to permit a member to find a spirit of love, unity and justice within himself so as to enable that member to convey such to others; serves to open a member's moral equilibrium to plant the seed of unfaltering rightiousness, and to allow a member to see and know that "God" is a man; serves to bring a member closer to "God" and to the divine communication of "the living God"; and serves as a remembrance of "God".

c. The practice of smoking cannabis as it exists at said premises involves non-members of the faith as well as members.

d. Cannabis is freely given for use to adults and children who are not members of the faith as a part of proselytizing. There is only a minimal subjective check on the distribution of cannabis to non-members and no attempt to insure that the non-members sincerely intend to become members of the faith and are not feigning a religious interest in order to use cannabis. Non-members are not required to prove their sincerity in terms of seeking to adopt the faith. There is no period of religious training which non-members must go through prior to being given cannabis for use. The smoking of cannabis by non-members is permitted simultaneously with any religious training in a "smoke as you learn" manner.

e. Cannabis is not smoked as a limited part of practice at one ceremony. Rather, it is part of the practice that the members of the faith continually smoke cannabis throughout their waking hours independently of a prayer service or a particular ritual and that smoking of cannabis be done anywhere and not solely inside a church building.

f. It is part of the practice that the children of adult members of the faith are permitted to smoke cannabis as part of their upbringing in the faith.

g. The belief in the use of cannabis and the fact that cannabis is to be smoked is not the result of a literal reading of the written religious laws and doctrinal passages upon which the practices are based. Rather,

the use and manners of use of cannabis in religious practice is predicated on an attenuated interpretation of certain portions of the written doctrine.

h. The use of cannabis is an essential portion of the religious practice. However, any prohibition of this Court on the use of cannabis in the practice of the faith would not effect other aspects of life of members of the faith, nor preclude them from belief in their "God", nor preclude them from practicing the doctrines, moral precepts, dietary laws, etc., which form the backbone of their religious practice.

i. There is nothing done by members of the faith to counter-balance or neutralize those interests of the State of Florida behind the legislation in question as those interests are stated below.

10. Regarding the nature of the State of Florida's interests behind the laws against the possession and use of cannabis and Section 823.10, Florida Statutes (1977), this Court finds the following to be proven and/or shown to be directly or inferentially the purpose behind the legislation in question:

a. To protect the physical and mental health of the adults and children who would use this drug.

b. To protect the safety of the public, both potential users and non-users, whose safety would be jeopardized by those engaging in conduct while under the influence of cannabis.

c. To protect society from the commission of drug related crimes.

d. To avoid a burden on society caused by the resulting dependency of users upon society due to failure in ability and/or desire to be self-sufficient working and functioning members of society.

e. To preserve the morals of this society.

11. The State could not reasonably enforce its drug laws regarding cannabis if those drug laws were to be nullified by a religious practice exception for the Ethiopian Zion Coptic Church.

12. The interests behind the State of Florida's legislation in question are compelling State interests of the highest nature.

13. In balancing the nature of the State of Florida's interests behind the legislation in question as against the nature of the use of cannabis in the practice of the Ethiopian Zion Coptic Church as practices at the aforementioned premises, this Court finds that the State's interests far outweigh those of said church in continuing to use, keep, possess and deliver cannabis at the dwelling house in question.

14. As a consequence of the balancing process, this Court finds that the Free Exercise of Religion Clause of the First Amendment does not bar enforcement of the laws in question by the State of Florida against the premises at 43 Star Island, Miami Beach, Dade County, Florida, or the defendant, JACQUELYN RENEE TOWN, as owner of said premises.

15. The illegal use, keeping, possession and delivery of cannabis at 43 Star Island, Miami Beach, Dade County, Florida will continue unless this Court enjoins same.

16. On the facts of this case, there is a need for the issuance of an immediate temporary injunction in light of the nature of the conduct creating the nuisance involved here.

17. There is no adequate alternative remedy that would satisfy the purposes served by an injunction.

18. The public will suffer irreparable harm if the conduct at issue is allowed to continue.

COUNT II

19. The Defendant, JACQUELYN RENEE TOWN, received the premises as a gift from Brother Keith Gordon, an elder in the Ethiopian Zion Coptic Church in Jamaica. The deed reflects a purchase price of $270,000.

20. The Defendant, JACQUELYN RENEE TOWN, does not know from whom she purchased the premises, did not participate in the negotiations, never saw the cash used to buy the premises, did not attend the closing, and never participated in the transaction in any way.

21. The premises consist of a large main house, and two smaller houses. Ms. Town and her two minor children live in the larger of the small houses rather than the main house. There is a cook who lives in the smallest house. There is a full-time maid for the main

house paid for from the money received from Keith Gordon.

22. The main house has a teletype machine in it, which Ms. Town has never used, nor does she know who put it there, except that it appeared one day after she took title.

23. There are numerous file cabinets in the main house, which do not belong to Ms. Town and which were placed there by individuals unknown to her, the contents of which are unknown to her.

24. There are guards at the entrance to the premises which are paid by Brother Louv (Thomas Reilly) whom Ms. Town concedes is her priest.

25. Several months ago, Miami Beach Police found $91,000. in cash on the premises, which Ms. Town admits belonged to her and was used for household expenses. The money had been given to her by Keith Gordon, an elder in the Church.

26. At least three times a day members of the Church intentionally gather at 43 Star Island for prayer. These gatherings occur approximately at dawn, in the later afternoon and in the early evening. Although there is no prearranged time for such gatherings, it is clear that attempts are made to hold, and prayers are in fact held on a regular basis at such times with whoever happens to be at the premises, and wishes to take part in the group prayer. The group prayers consist of singing and chanting, and may last up to several hours per session. The Court has observed a videotape for a group prayer at 5:30 A.M. and has heard a tape of

the chanting which accompanies such prayer, attended by approximately 15 to 20 people, which prayer has been described as typical (by witnesses for both plaintiffs and defendants) of the prayers held thrice daily. The main building is used for prayer gatherings.

27. The present permitted use of 43 Star Island, according to the Zoning Ordinance of the City of Miami Beach, Florida, is RS-1.

28. Section 6-1 of said Zoning Ordinance provides in pertinent part:

> 6-1 RS-1, RS-2, RS-3 and RS-4 Single-Family Residential Districts.
>
> A. DISTRICT PURPOSE. These Districts are designed to foster and protect Miami Beach's single-family residential neighborhoods. The four Districts vary only in minimum lot area and lot width requirements.
>
> B. USES PERMITTED. No land, water or structure may be used, in whole or in part, except for one or more of the following uses:
>
> 1. Single-family detached dwelling.
>
> 2. The following uses may be permitted as a Conditional Use:

a. Municipally owned and operated recreation facility, playground, playfield, park and beach.

b. Municipal buildings and uses.

c. Temporary use for a period not to exceed 15 days.

3. Accessory uses for above uses.

29. From the City of Miami Beach, Florida, Defendant TOWN has neither applied for, nor received, nor been granted nor used under a grant of approval for any conditional use of said premises as a church, in accordance with the Zoning Ordinance of the City of Miami Beach, Florida.

30. Churches are unconditionally permitted in the City of Miami Beach, Florida in several zoning districts.

31. The premises at 43 Star Island, Miami Beach, Florida are being used as a church and for church purposes within the contemplation of the Zoning Ordinance of the City of Miami Beach, Florida and in violation of this ordinance.

32. Such use will continue unless this Court enjoins the same.

33. On the facts of this case, there is no adequate alternative remedy that would satisfy the purposes of an injunction.

34. There is insufficient evidence that the premises at 43 Star Island, Miami Beach, Florida are being used as a multifamily dwelling.

In light of the above findings of fact and conclusions of law, it is hereby

ORDERED AND ADJUDGED as to Count I that the Motion for a Temporary Injunction is GRANTED and the Defendant JACQUELYN RENEE TOWN is immediately enjoined from maintaining a public nuisance at 43 Star Island, Miami Beach, Dade County, Florida, by allowing any person to enter or remain on said premises, and while entering or remaining there to keep, possess, smoke, use, and/or deliver cannabis in violation of Chapter 823.10, Florida Statutes (1978).

ORDERED AND ADJUDGED as to Count II that the Motion for a Temporary Injunction is GRANTED, and

a. The Defendant, JACQUELYN RENEE TOWN is hereby enjoined and restrained from permitting the premises at 43 Star Island from being used as a church or for church purposes, or a center for organized church activity and learning, including organized church prayers, organized church business and organized church study.

b. The Defendant, JACQUELYN RENEE TOWN is enjoined from permitting group or communal prayer services, which include singing and chanting and which are held on a regular basis.

c. This Order shall in no way be construed to prohibit the Defendant JACQUELYN RENEE TOWN

from praying in her own home, either alone or with members of her immediate family, or with several friends who may wish to do so.

d. This Order is not intended to prohibit the Defendant JACQUELYN RENEE TOWN from practicing her religion in her own home except as prohibited above.

e. The parties are directed to comply with the spirit and intent of this Order.

DONE AND ORDERED at Miami, Dade County, Florida this 17th day of January, 1979.

/s/ Frederick N. Barad
FREDERICK N. BARAD
CIRCUIT COURT JUDGE

Sec. 25-66.09. Permitted and accessory land uses allowable for single family residence districts.

No building, structure, construction, land or part thereof shall be erected, altered or used in whole or in part in any single family residence district, except as follows:

(A) Permitted uses. Single family residences.

(B) Accessory uses. Garages, carports, storage buildings, patios, fireplaces, piers, docks, swimming pools, cabanas, tennis courts, tree houses, playground equipment, sports fixtures, athletic areas, putting greens and parking areas, when located on the same plot, to be established by a unity of title declaration under the provisions relating thereto, if necessary. No accessory use shall be permitted which involves, directly or indirectly, any business, trade, occupation or profession. Clubhouses, including restaurant and bar facilities, pro shops and utility buildings for grounds keeping, golf carts and sports activity purposes shall be considered accessory uses provided that they relate to permissible recreational activities for the individual single family residential area which they serve or in which they have been intentionally established and allowed as the amenities for the single family residential complex or development. (Ord. No. 1828, §4, 7-18-73)

Sec. 25-66.10. Conditional land uses for single family residential districts.

(A) *General provisions.*

(1) The following conditional uses shall be permitted in single family residence districts, subject to the approval of the city council after submission of a request therefor to the planning and zoning board according to the procedures therefor prescribed by the rules and regulations of that board.

(2) In considering such requests, the board and the city council shall consider the effect of the proposed uses on existing and future dwellings in the vicinity, the proposed site, planning and landscaping, traffic safety, and the general health, safety and welfare of the community. Any such requests may be granted, conditioned on the faithful adherence to and fulfillment of such restrictions and conditions including the dedication of property for streets, alleys, recreational space, and sidewalks, as shall be determined to be necessary for the protection of the surrounding areas and the general welfare of the citizens.

(3) No approval of a conditional use shall have a duration of a period greater than:

(a) Twelve (12) months, if the conditional use may be commenced without construction that requires a building permit; or

(b) Eighteen (18) months, if the conditional use may be commenced only by construction requiring a building permit.

In the event the duration of a conditional use approval expires prior to commencement of the conditional use approved, then the conditional use approval shall be null and void and of no further effect. Application for a building permit shall be deemed commencement of the conditional use if the duration period set forth in section 25-66.10(A)(3)(b) applies to the approved conditional use.

(4) Each conditional use approval shall specify which duration period set forth in section 25-66.10(A)(3) shall apply, and such specification shall be binding and conclusive upon the city and the applicant.

(5) The voiding of a building permit pursuant to section 7.1-1 shall void a conditional use approval if the approval specifies the duration period set forth in section 25-66.10(A)(3)(b).

(6) The duration of a conditional use approval may be extended for a period not to exceed the original term by the city council after the request therefor is submitted to the environmental development and zoning advisory board for its recommendation.

(B) *Enumeration of conditional uses.*

(1) Churches and places of worship of God, including church operated day care centers and social service activities.

(2) Cemeteries.

(3) Public and nonprofit museums, libraries, social centers, parks, open space and recreational areas, including bodies of water.

(4) Public, private and parochial schools having an established and officially approved curriculum, including day care, pre-school, kindergarten, elementary, middle and high schools, colleges or universities. All activities and facilities normally considered accessory thereto shall be included hereunder, such as dormitories, lunch room, book stores, gymnasiums, playgrounds and athletic fields which are owner and operated by the main facility and used in connection therewith and which are located on the same plot or on a plot which is confined therewith under a unity of title declaration.

(5) Paved, nonenclosed parking areas for temporary parking of self-propelled passenger vehicles which is used or provided as a practical adjunct to a permitted or conditional use as herein provided. When such use is located on a separate plot, the provisions of the Code of Ordinances relating thereto shall be followed and observed, including the provisions of section 25-100.

(6) Helistops, as defined, regulated and controlled by section 25-18.100 et seq. of this Code of Ordinances.

(7) Signs, as defined, regulated and controlled by Chapter 18 of this Code of Ordinances.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 2 1981
ALEXANDER L. STEVAS
CLERK

No. 81-832

In the Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation now known as WOODLANDS PARK BAPTIST CHURCH; WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,
Petitioners,

vs.

CITY OF BOCA RATON, FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

M. A. GALBRAITH, JR., ESQ.
(Counsel of Record)
City Attorney
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QUESTIONS PRESENTED FOR REVIEW

1. Was the petition for writ of certiorari timely filed?

2. Is the decision below a "final judgment or decree" within the meaning of 28 U.S.C. §1257?

3. Does the decision below rest on an independent and adequate basis in state law?

4. Does the decision below present a substantial question of federal law?

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No. 81-832

In the Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF BOCA RATON, INC., a Florida non-profit corporation now known as WOODLANDS PARK BAPTIST CHURCH; WOODLANDS CHRISTIAN ACADEMY, an unincorporated educational institution, and the REVEREND JERRY PETERSON, Pastor, Faith Baptist Church,

Petitioners,

vs.

CITY OF BOCA RATON, FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

OPINIONS BELOW

The dismissal of the petition for review by the Florida Supreme Court is now reported. *Faith Baptist Church of Boca Raton, Inc. v. City of Boca Raton,* 402 So.2d 609 (Fla. 1981). The decision of the Fourth District Court of Appeal affirming the final judgment of the Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County has been reported. *Faith Baptist Church of Boca Raton, Inc. v. City of Boca Raton,* 402 So.2d 1381 (Fla. 4th DCA 1981).

The final judgment of the trial court is not published, but is set forth in Appendix A to the petition for writ of certiorari (A: 5-10).[1]

JURISDICTION

This Court's jurisdiction has been invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution, Article I, Section 3:

> Religious freedom.— There shall be no law respecting the establishment of religion or prohibiting or pe-

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1. Page-reference symbols used:
"P" for the petition for writ of certiorari.
"A" for the appendix to the petition for writ of certiorari.
"RA" for the appendix to this brief of the Respondent.

nalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. . . .

Code of Ordinances, City of Boca Raton, Section 25-66.10:

Sec. 25-66.10. Conditional land uses for single family residential districts.

(A) General provisions.

(1) The following conditional uses shall be permitted in single family residence districts, subject to the approval of the city council after submission of a request therefor to the planning and zoning board according to the procedures therefor prescribed by the rules and regulations of that board.

(2) In considering such requests, the board and the city council shall consider the effect of the proposed uses on existing and future dwellings in the vicinity, the proposed site, planning and landscaping, traffic safety, and the general health, safety and welfare of the community. Any such requests may be granted, conditioned on the faithful adherence to and fulfillment of such restrictions and conditions including the dedication of property for streets, alleys, recreational space, and sidewalks, as shall be determined to be necessary for the protection of the surrounding areas and the general welfare of the citizens.

• • •

(B) Enumeration of conditional uses.

( ) Churches and places of worship of God, including urch operated day care centers and social service activities.

• • •

(4) Public, private and parochial schools having an established curriculum, including day care, preschool, kindergarten, elementary, middle and high schools, colleges or universities. All activities and facilities normally considered accessory thereto shall be included hereunder, such as dormitories, lunch room, bookstores, gymnasiums, playgrounds and athletic fields which are owned and operated by the main facility and used in connection therewith and which are located on the same plot or on a plot which is confined therewith under a unity of title declaration.[2]

STATEMENT OF THE CASE

In November, 1978, the City of Boca Raton sought injunctive relief against the operation of a school on property in the City owned by the Petitioners and zoned for single-family residential uses.

The Petitioners had lawfully established a church on their property under the zoning ordinances of the City. In 1978, the Petitioners commenced the operation of a school known as Woodlands Christian Academy without having obtained a conditional use approval from the City for the school use.

The City's zoning code differentiates between churches and schools with respect to the uses of property within single-family residential districts which are allowable if conditional use approval is obtained. Section 25-66.10(B)(1) and (4), Code of Ordinances of the City, specifically enumerates both churches and schools as conditional uses, but neither is permitted as a matter of right without the express approval of the City Council, after review by the

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2. As amended by Ordinance 2930, adopted on May 19, 1981 (RA: 17).

Planning and Zoning Board. Section 25-66.10(A)(2), Code of Ordinances, provides that a conditional use approval may be conditioned upon such restrictions and conditions "as shall be determined to be necessary for the protection of the surrounding areas and the general welfare of the citizens."

The trial court found that, as the result of three applications for conditional use approval that were submitted by Petitioners for the property and two approvals that were granted, the approved conditional uses for the property were a church, a day care center and a sunday school, but not a school (A: 7-8). The third application, for a "church and classrooms," was withdrawn by Petitioners after a public hearing by the Planning and Zoning Board but before City Council consideration.

The record below shows that Woodlands Christian Academy is, in fact, a school. Among other things, attendance at Woodlands Christian Academy by school-age children satisfies Florida's compulsory school attendance law, Chapter 232, Florida Statutes. The school offers a full range of secular education, from basic reading, writing and arithmetic skills to electives such as sewing and auto mechanics, to students from age one to grade 12. There is no apparent difference between the instruction offered at this school and that offered at public or other private schools except for the methodology, the religious orientation, and Petitioners' belief that their instruction is superior.

No showing was made that the City has any interest whatsoever in regulating curriculum, course content, methods of instruction or the qualifications of instructors at the school. Also, the record below fails to show that the City has improperly refused to approve private or church-related schools elsewhere in the City, or has imposed un-

reasonable and onerous conditions upon any such school use approvals.

It has been the position of the City throughout that, because churches and schools are specifically enumerated as separate and distinct conditional uses, and because Petitioners have not obtained a conditional use approval for their school, it is unnecessary and irrelevant to examine the feathery edges of the definition of "church." Regardless of the religious significance of the school to the Petitioners, the City asserted—and the trial court found as a matter of law (A: 8)—that Woodlands Christian Academy is a school use for which conditional approval is required from the City.

The trial court's final judgment is the only statement of the law of the case. The Fourth District Court of Appeal affirmed, without opinion, and the Florida Supreme Court dismissed a petition for review, finding that it lacked jurisdiction.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari has not been filed in a timely manner. The judgment sought to be reviewed is that of the Fourth District Court of Appeal of Florida, which denied petitioners' motion for rehearing on July 1, 1981. A subsequent petition for review to the Florida Supreme Court did not postpone the finality of that decision, nor was the mandate stayed. The Florida Supreme Court predictably dismissed the petition for review for want of jurisdiction. The petition for writ of certiorari was filed here more than 90 days after entry of the judgment of the Fourth District Court of Appeal, and that time limit was not extended. Therefore, the petition is too late.

The decision below is not of such finality as to warrant review by this Court. The trial court expressly anticipated further judicial review following consideration of all the relevant factors, including the competing police power and religious interests, in an administrative forum. The parties were required to inform the court of the final action of the City, and the court retained jurisdiction "for the purpose of providing such additional relief as may be necessary" (A: 5, 9). Whether the City's final action will unduly burden Petitioners' Free Exercise rights is sheer speculation at this stage of the controversy. The City's final action will be subject to further judicial review, and the Petitioners will not be deprived of the federal claim they are now attempting to raise. Other federal questions may be raised by the action of the City, and the decision of those questions might also require review by this Court at a later date. Review by this Court now is premature.

The decision below rests entirely upon adequate and independent state grounds. The trial court construed the terms of the City's zoning ordinance to decide that the Petitioners are operating a school upon the premises and that conditional use approval for the school is required. The consideration of federal issues was deferred until the completion of the administrative process. The final judgment turned upon state law relating to municipal zoning powers, not upon any federal issue.

Finally, the decision below does not present a substantial question of federal law, but instead compels the Petitioners to enter an administrative forum so that any federal question may be clearly framed and submitted for judicial review at a later date. The Petitioners have not suffered an undue burden upon their constitutional freedom to exercise their religious beliefs; whether they ever

will remains to be established. Although a subsequent state court judgment in this controversy might raise a substantial federal question, such an event has not yet occurred.

REASONS FOR DENYING THE WRIT

1. The Court Is Without Jurisdiction Because the Petition for Writ of Certiorari Was Not Timely Filed.

A writ of certiorari must be applied for within 90 days after entry of the judgment for which review is sought, unless the time has been extended. 28 U.S.C. §2101(c).

The judgment sought to be reviewed here is that of the Fourth District Court of Appeal of Florida, entered on May 20, 1981 (A: 2). On July 1, 1981, the court denied Petitioners' motion for rehearing (RA: 22), and that date became the date from which the time for filing a petition for writ of certiorari began to run, under Rule 20.4 of this Court.

Under Florida appellate rules, the decision of the Fourth District Court of Appeal became final on July 1, 1981, and the petition for review to the Florida Supreme Court did not postpone the finality of that decision. Fla. R. App. P. 9.120, 9.310 and 9.340 (RA: 23).

No order staying the mandate of the Fourth District Court of Appeal was ever sought or entered, and the mandate issued three weeks later (A: 3).

The Florida Supreme Court dismissed the petition for review for want of jurisdiction (A: 1). The dismissal was entirely predictable; more than a year earlier, in *Jenkins v.*

State, 385 So.2d 1356 (Fla. 1980), the Florida Supreme Court declared unequivocally that it lacks jurisdiction to review a "per curiam affirmed" decision when the basis for review is an alleged conflict between that decision and another state appellate court decision. *Jenkins, supra,* cited in the order below dismissing the petition for review, established that the Fourth District Court of Appeal is the "highest court" of Florida in which a decision could be had in this case. 28 U.S.C. §1257.

As an ancillary but irrelevant matter, the Petitioners obtained from the trial court a stay of the trial court's final judgment on September 14, 1981, subject to the condition that their petition for writ of certiorari be filed in the United States Supreme Court within 30 days (RA: 26). The Petitioners failed to comply with that condition, and the stay is no longer in effect by its own terms.

Because the petition for writ of certiorari was filed more than 90 days after entry of the judgment of the Fourth District Court of Appeal, and because that time limit was not extended, the petition was not timely filed and should be dismissed.

2. The Court Is Without Jurisdiction Because the Decision Below Is Not a "Final Judgment or Decree" Within the Meaning of 28 U.S.C. §1257.

Jurisdiction is claimed under 28 U.S.C. §1257, which provides for review of this Court of "final" judgments of the highest state court in which a decision could be had.

The decision of the Fourth District Court of Appeal (A: 2) affirmed without opinion the final judgment of the trial court, which enjoins Petitioners from operating their school unless, within 30 days of the order, Petitioners apply to the City for a conditional use approval for a

school use. If the application had been timely filed, the injunction by its own terms would have been stayed until final action by the City on the application (A: 5, 9).

The Petitioners chose not to comply with the final judgment and did not apply for conditional use approval for a school use. Instead, the Petitioners have taken issue with the application requirement, arguing that a mere application is an "undue burden" upon the free exercise of Petitioners' religion (P: 15). The courts below were uniformly unpersuaded by that argument.

It is sheer speculation that the Respondent's final action will burden Petitioners' Free Exercise rights, unduly or otherwise. Petitioners do not attempt to describe what burdens they fear await them should they apply for conditional use approval, except a fear that the City might "approve or condemn the curriculum being used" at the school (P: 16) pursuant to Section 25-66.10(B)(4) of the Code of Ordinances, but that fear is groundless.[3]

Whether the mere application for conditional use approval for a school use unduly burdens Petitioners' Free Exercise rights depends upon the final action to be taken by the City. The least burden would be an approval without the imposition of conditions. Further judicial review will be necessary to determine whether any other action by the City will constitute an undue burden, and the trial court expressly anticipated further judicial review by requiring the parties to inform the court of the final action of the City and by retaining jurisdiction "for the purpose of providing such additional relief as may be necessary" (A: 5, 9).

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3. All references in that section and in other zoning code sections to an "officially approved" curriculum were deleted by Ordinance 2930, adopted on May 19, 1981, effective immediately upon adoption (RA: 17).

These additional judicial proceedings may well require the decision of other federal questions that might also require review by this Court at a later date. Ordinarily, this Court has declined to review decisions of a state court on a federal issue without awaiting the completion of additional proceedings anticipated in the lower state courts. *Republic Natural Gas Company v. Oklahoma,* 334 U.S. 62 (1948). The small class of exceptions to this general practice consists of final state court determinations of claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Local 438, etc. v. Curry,* 371 U.S. 542 (1963); *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975). This case does not fall within that small class of exceptions.

Here, further proceedings are contemplated but the federal issue is not "conclusive" and the outcome is not "preordained." *Cox Broadcasting Corporation, supra,* 420 U.S. at 479. Likewise, the proceedings which remain could make unnecessary a decision on the federal questions. If they do not, Petitioners will not be precluded from further judicial review of their federal claims. Finally, the issue presented here does not seriously erode federal policy.

Because the decision below contemplates additional proceedings which may require the decision of other federal questions that might also require later review by this Court, the decision below is not "final" within the meaning of 28 U.S.C. §1257, and therefore this Court should decline to take jurisdiction.

3. The Court Is Without Jurisdiction Because the Decision Below Rests on Adequate and Independent State Grounds.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). In order for jurisdiction to exist, it must appear that decision of the federal issue was necessary to the judgment below. *Lynch v. Pierson*, 293 U.S. 52 (1934).

The final judgment of the trial court contains no references to either the state or the federal constitutions, and the court premised its decision upon decisions of Florida and New York state courts relating to county and municipal zoning powers. No decision of any federal court is cited (A: 5-10).

Although the trial court concluded as a matter of law that the "religious orientation" of the Petitioners' school use "does not exempt that use from the requirement to obtain a conditional use approval from the city" (A: 8), the trial court obviously contemplated that any federal question under the Free Exercise clause would be preserved for consideration at a later date. The trial court concluded as a matter of law that the Petitioners should apply to the City for a conditional use approval for the school use "so that the local administrative process may hear and consider all the relevant factors, including the competing police power and religious interests." (A: 8).

The trial court properly resolved certain threshhold issues by deciding that the Petitioners are operating a "school" subject to Section 25-66.10(B)(4) of the Code of Ordinances, and that the City is entitled to injunctive relief

to enforce its zoning code. Competing police power and religious interests were not decided, but were deferred.

There is no indication in the decision below that the court "felt constrained to rule as it did" because of the federal constitution. *Minnesota v. National Tea Co.*, 309 U.S. 551, at 555 (1940).

Because the decision below rests on adequate and independent state grounds, this Court is without jurisdiction.

4. The Decision Below Does Not Present a Substantial Question of Federal Law.

To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be substantial. *Zucht v. King*, 260 U.S. 174 (1922).

Not every zoning case affecting the use of property by churches has been thought to be imbued with a substantial federal question. *See, e.g., Milwaukee Company of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 330 P.2d 5, 74 ALR 2d 347 (1958), *cert. denied*, 359 U.S. 436 (1959); *Portage Township v. Full Salvation Union*, 318 Mich. 693, 29 N.W.2d 297 (1947), *cert. denied*, 333 U.S. 851, *petition for rehearing denied*, 334 U.S. 830 (1948).

Here, the decision below deferred the consideration of federal claims to a later date. The mere application for conditional use approval is not remotely similar to any other governmental requirement previously found to be an undue burden upon Free Exercise rights, and none of the cases cited by the Petitioners support their contention that it imposes such a burden.

Several of Petitioners' cited cases are nothing more than statutory construction cases, distinguishable upon the

terms of the zoning ordinances, such as *City of Concord v. New Testament Baptist Church*, 382 A.2d 377 (N.H. 1978), where the term "facilities usually connected with a church" was construed to include a church-operated day school. No similar term aids the Petitioners here.

Others did not involve the use of church property for school uses, as in *In the Matter of Community Synagogue v. Bates*, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956), where the church applied for a permit to change a use from single-family residential to that of a church. In that case, in fact, the court remanded for issuance of a permit subject to reasonable administrative conditions.

This controversy may eventually generate a state court decision presenting a substantial question of federal law, but that is conjecture; at this stage, that event has not yet occurred.

CONCLUSION

WHEREFORE, for the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Telephone: (305) 393-7716
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 30th, 1981, three copies of the foregoing brief were served by mail upon Charles E. Craze, Esquire, Gibbs & Craze Co., L.P.A., 6929 W. 130th Street, Suite 600, Cleveland, Ohio 44130-7895, and that two additional copies were served by mail upon Jon Jay Ferdinand, Esquire, 1720 Harrison Street, 18th Floor, Hollywood, Florida 33020.

I FURTHER CERTIFY that I received three copies of the Petition for a Writ of Certiorari on November 3, 1981.

M. A. GALBRAITH, JR.

APPENDIX

ORDINANCE NO. 2930

AN ORDINANCE OF THE CITY OF BOCA RATON RELATING TO PRIVATE AND PAROCHIAL SCHOOLS; AMENDING SECTIONS 25-66.10(B)(4), 25-68(A)(3), 25-68.2(A)(6), 25-68.4(A)(2), 25-69(B)(1), 25-70(AA)(1), AND 25-70.1(AA)(1), CODE OF ORDINANCES, TO DELETE VARIOUS PROVISIONS OF THE ZONING CODE RELATING TO THE ACCREDITATION OF, AND THE CURRICULUM OFFERED BY, PRIVATE OR PAROCHIAL SCHOOLS; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Section 25-66.10(B)(4), Code of Ordinances, is amended to read:

Section 25-66.10. Conditional land uses for single family residential districts.

(B) Enumeration of conditional uses.

(4) Public, private and parochial schools having an established [and officially approved]* curriculum, including day care, pre-school, kindergarten, elementary, middle and high schools, colleges or universities. All activities and facilities normally considered accessory thereto shall be included hereunder, such as dormitories, lunch room, book stores, gymnasiums, playgrounds and athletic fields which are *owned* [owner] and operated by the main facility and

*Bracketed material appears in Ordinance 2930 in struck-through type, indicating language to be deleted.

used in connection therewith and which are located on the same plot or on a plot which is confined therewith under a unity of title declaration.

Section 2. Section 25-68(A)(3), Code of Ordinances, is amended to read:

Section 25-68. Residential R-3 Districts.

The following regulations shall apply in all R-3 Districts:

(A) Uses permitted.

No building or structure, or part thereof, shall be erected, altered or used, or premises used, in whole or in part for other than one or more of the following specified uses:

(3) Churches and public, private and parochial nursery, kindergarten, elementary and high schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricula substantially, equivalent to public schools of comparable grades and shall be accredited by the state department of education.]

Section 3. Section 25-68.2(A)(6), Code of Ordinances, is amended to read:

Section 25-68.2. Residential R-3-B Districts.

The following regulations shall apply in all R-3-B Districts:

(A) Uses permitted.

No building or structure, or part thereof, shall be erected, altered or used, or premises used, in whole or in part for other than one or more of the following specified uses:

(6) Churches and public, private and parochial nursery, kindergarten, elementary and high schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricula substantially equivalent to public schools of comparable grades and shall be accredited by the state department of education.]

Section 4. Section 25-68.4(A)(2), Code of Ordinances, is amended to read:

Section 25-68.4. R-3-D Residential Districts.

The following uses shall apply to all R-3-D Districts:

(A) Uses permitted.

No building or structure or part thereof shall be erected, altered or used or premises used in whole or in part for other than one of the following specified uses:

(2) Churches and public, private and parochial nursery kindergarten, elementary and high schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricular substantially equivalent to public schools of comparable grades and shall be accredited by the state department of education.]

Section 5. Section 25-69(B)(1), Code of Ordinances, is amended to read:

Section 25-69. Residential R-4 Districts.

The following regulations shall apply in all R-4 Districts:

(B) The following conditional uses which may be considered and granted in accordance with the procedures contained and set forth in section 25-66, subparagraph (A)(2) of the Code of Ordinances of the City of Boca Raton.

(1) Church and public, private and *parochial* [paroachial] nursery, kindergarten, elementary and high schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricula substantially equivalent to public schools of comparable grades and shall be accredited by the State Department of Education.]

Section 6. Section 25-70(AA)(1), Code of Ordinances, is amended to read:

Section 25-70. Conditional uses allowed.

The following conditional uses may be considered and granted in accordance with the procedures contained and set forth in section 25-66.10, paragraph (A) of the Code of Ordinances of the City of Boca Raton.

(1) Churches and public, private and parochial schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricula substantially equivalent to public schools of comparable grade and shall be accredited by the state department of education.]

Section 7. Section 25-70.1(AA)(1), Code of Ordinances, is amended to read:

Section 25-70.1. Residential R-5-A Districts.

(AA) Conditional uses allowed.

The following conditional uses may be considered and granted in accordance with the procedures contained and set forth in section 25-66.10, paragraph (A) of the Code of Ordinances of the City of Boca Raton.

(1) Churches and public, private and parochial nursery, kindergarten, elementary and high schools. [Private and parochial schools, other than nursery or kindergarten schools, shall offer curricula substantially equivalent to

public schools of comparable grades and shall be accredited by the state department of education.]

Section 8. Specific authority to codify this ordinance in the Code of Ordinances is hereby granted.

Section 9. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this 19th day of May, 1981.

CITY OF BOCA RATON, FLORIDA
/s/ William A. Konrad
William A. Konrad, Mayor

ATTEST:

/s/ Candace Bridgwater, for
Louise C. Owens, City Clerk

Approved as to form:
/s/ M. A. Galbraith, Jr.
M. A. Galbraith, Jr.
City Attorney

ORDER

IN THE
DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 81-263

FAITH BAPTIST CHURCH OF BOCA RATON,
INC., etc., et al.,
Appellant,

v.

CITY OF BOCA RATON, etc.,
Appellee.

July 1, 1981

BY ORDER OF THE COURT:

ORDERED that the Appellant's Motion for Rehearing and/or Clarification filed June 4, 1981, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk

cc: Jon Jay Ferdinand, Attorney
M.A. Galbraith, Jr., City Attorney
cms

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.120. Discretionary Proceedings to Review Decisions of District Courts of Appeal

(a) Applicability. This rule applies to those proceedings which invoke the discretionary jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A).

(b) Commencement. The jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A) shall be invoked by filing two copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed.

(c) Notice. The notice shall be substantially in the form prescribed by Rule 9.900. The caption shall contain the name of the lower tribunal, the name and designation of at least one party on each side, and the case number in the lower tribunal. The notice shall contain the date of rendition of the order to be reviewed and the basis for invoking the jurisdiction of the court.

(d) Briefs on Jurisdiction. Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction and accompanied by an appendix containing a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice. Respondent's brief on jurisdiction shall be served within 20 days after service of petitioner's brief. No reply brief shall be permitted. When jurisdiction is invoked pursuant to Rule 9.030(a)(2)(A)(v) or (a)(2)(A)(vi) (certifications by the district courts to the Supreme Court), no briefs on jurisdiction shall be filed.

(e) Accepting or Postponing Decision on Jurisdiction; Record. If the Supreme Court accepts or

postpones decision on jurisdiction, the Court shall so order and advise the parties and the clerk of the district court of appeal. Within 60 days thereafter or such other time set by the Court, the clerk shall transmit the record.

(f) Briefs on Merits. Within 20 days of rendition of the order accepting or postponing decision on jurisdiction, the petitioner shall serve the initial brief on the merits. Additional briefs shall be served as prescribed by Rule 9.210.

Rule 9.310. Stay Pending Review

(a) Application. Except as provided by general law and in section (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(1) *Money Judgments.* When the order is solely for the payment of money, a stay pending review is automatic, without the necessity of motion or order, on posting of a good and sufficient bond equal to the amount ordered to be paid, plus 15% thereof. If the liability of a party is less than the entire amount ordered to be paid, the bond required for that party shall be equal to the amount of such liability, plus 15%. Multiple parties having common liability may file a bond in the amount of the common liability, plus 15%.

(2) *Required Statement for Rehearing En Banc.* A rehearing en banc is an extraordinary proceeding.

In every case the duty of counsel is discharged without filing a motion for rehearing en banc unless the ground set forth in (1) is clearly met. When filed by an attorney, the motion shall contain the following statement:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: (citing specifically the case or cases).

/s/ .....

(3) *Formal Order on Motion for Rehearing En Banc.* An order on a motion for rehearing en banc shall be deemed denied upon a denial of rehearing or a grant of rehearing without en banc consideration. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, and may require additional argument.

Rule 2.340. Mandate

(a) Issuance of Mandate. Unless otherwise ordered by the court or provided by these rules, the clerk shall issue such mandate or process as may be directed by the court after expiration of 15 days from the date of an order or decision. A copy thereof, or notice of its issuance, shall be served on all parties.

(b) Extension of Time for Issuance of Mandate. If a timely motion for rehearing or for clarification has been filed, the time for issuance of the mandate or other process shall be extended until 15 days after rendition of the order denying the motion or, if granted, until 15 days after the cause has been fully determined.

IN THE
CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO. 78-4747 CA (L) 01 G

CITY OF BOCA RATON, a Florida municipal corporation,
Plaintiff,

vs.

FAITH BAPTIST CHURCH OF BOCA RATON, INC., et al.,
Defendants.

ORDER ON MOTION ENFORCING FINAL JUDGMENT AND CONTEMPT AND MOTION FOR STAY

THIS CAUSE having come on to be heard on the 4th day of September 1981 on Plaintiff's Motion for Order enforcing Final Judgment and for Contempt and Defendant's Motion for Stay Pending further Review as amended ore tenus at the time of the hearing to include review in the United States Supreme Court and the Court taking testimony from the Plaintiff regarding its Motions and further hearing argument of counsel for the Plaintiff and Defendant herein on both of said Motions it is upon consideration

ORDERED AND ADJUDGED as follows:

1. That the Plaintiff's Motion for Order Enforcing Final Judgment and for Contempt is hereby denied.

2. That the Defendant's Motion for Stay Pending Further Review in the United States Supreme Court is

hereby granted upon the condition that the Defendants file their Petition for Writ of Certiorari in the United States Supreme Court within thirty (30) days and further in the event that the United States Supreme Court refuses to accept jurisdiction on Defendants' Petition for Writ of Certiorari or at such time that the United States Supreme enter its Order on the merits of said Petition for Writ of Certiorari, that said stay shall then be lifted.

DONE AND ORDERED, at West Palm Beach, Palm Beach County, Florida this 14th day of September, 1981.

/s/ Thomas E. Sholts
Judge, Circuit Court

Copies furnished to:
Jon Jay Ferdinand, Esq.
M.A. Galbraith, Jr., Esq.